**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 5811 of 2006**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE J.M.PANCHAL**

**HON'BLE SMT. JUSTICE ABHILASHA KUMARI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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**BONUS PLASTICS PVT.LTD. & 1 - Petitioner(s)**
**Versus**
**UNION OF INDIA THR' SECRETARY & 3 - Respondent(s)**

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**Appearance :**
MR DV PARIKH for Petitioners
MR PURVISH J MALKAN FOR MR. JITENDRA MALKAN for Respondents
NOTICE SERVED for Respondent(s) : 2 - 4.
NOTICE SERVED BY DS for Respondent(s) : 4,

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**CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL**

**and**

**THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI**

**Date : 20/11/2006**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)**

1. Rule. Mr. Purvesh J. Malkan, learned Standing Counsel for the Central Government waives service of notice on behalf of the respondents. It may be mentioned that by order dated September 25, 2006, the Division Bench comprising Hon'ble the Acting Chief Justice Y.R.Meena and Mr. Justice A.S.Dave directed the Registry to list this petition for final hearing on October 11, 2006. Therefore, the petition is taken up for final disposal today.

2. By filing the instant petition under Article 226 of the Constitution the petitioners have prayed to issue a writ of certiorari to quash the notice dated April 19, 2005 issued by the Superintendent, Central Excise, AR- IV Changodar, calling upon the Director of the petitioner No.1-Company to calculate the interest

on total duty amounting to Rs. 12,16,646/- (Rupees Twelve Lakhs Sixteen Thousand Six Hundred and Forty Six only), already paid willingly by the petitioners and pay the interest within five days from the date of the receipt of the notice. The petitioners have further prayed to issue a writ of certiorari to quash memo dated February 14, 2006 by which 7250 Kgs of PP Narrow Woven Fabrics valued at Rs. 7,28,625/- (Rupees Seven Lakhs Twenty Eight Thousand Six Hundred and Twenty Five only) is detained for non-payment of outstanding amount of interest of Rs. 7,25,806/- (Rupees Seven Lakhs Twenty Five Thousand Eight Hundred and Six only). The petitioners have also prayed to declare that the respondents are not entitled to auction the goods detained by them.

3. The petitioner No. 1 is a Company incorporated under the provisions of Companies Act, 1956. It is engaged in the business of manufacturing P.P. Multi – filament yarn and P.P. narrow woven fabrics. In the year 1999, the

officers of the Central Excise visited the business premises of the petitioners. The officers informed the petitioner that as their final product was exempted, they should pay excise duty on the P.P. Yarn, which was captively consumed in the manufacturing of the product. This stand of the officers of the Department was not accepted by the petitioners and the same was challenged before the appellate authority. The appellate authority held that the petitioners were entitled to pay duty on the final product. However, before that the petitioners had paid duty on yarn captively consumed, and therefore, the returns filed by the petitioners were accordingly assessed. Under the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000, goods capatively consumed are required to be valued at 115% of the cost of the manufacture thereof. The audit was carried on February 3,4 and 5, 2005 as well as on March 28, 2005 and it was noticed that there was short payment of duty to the extent of Rs. 12,16,643/-

(Rupees Twelve Lakhs Sixteen Thousand Six Hundred and Forty Three only). That duty was paid by the petitioners on March 19, 2005. Section 11A(2B) of the Central Excise Act, 1944 ("the Act" for short) *inter–alia* provides that where any duty or excise has not been levied or paid or has been short–levied or short-paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty before the service of notice on him under sub-section (1) of Section 11A and inform the Central Excise Officers of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid. The case of the petitioners is that the amount of duty was paid before the service of notice under sub-section (1) of Section 11A of the Act and therefore, it was not necessary for the officers of the Department to serve any notice under sub-section (1) of Section 11A of the Act in respect of the duty so paid. However, by communication dated April 19, 2005, the Superintendent of

Central Excise, AR- IV, Changodar called upon the Director of the petitioner No.1 to calculate the interest on total duty amounting to Rs. 12,16,646/- which was paid willingly and pay the same within five days from the date of receipt of the said communication. The petitioners gave reply to the same disputing the liability to pay interest. However, without affording any opportunity of being heard, the Superintendent, Central Excise, AR – IV, Changodar, Ahmedabad – II detained 7250 Kgs. of P.P. Narrow Woven Fabrics for non-payment of interest of Rs. 7,25,806/- by memo dated February 14, 2006.

4. The case of the petitioners is that the action of detaining the goods belonging to the petitioners is taken in clear violation of principles of natural justice and, therefore, the same is liable to be set aside. What is mentioned by the petitioners in the petition is that the recovery of the interest is a disputed issue between the Department and the present

petitioners as a result of which the order fastening liability to pay interest of Rs. 7,25,806/- could not have been passed without hearing the petitioners. What is maintained by the petitioners is that even if it is accepted for the sake of argument that the Department is entitled to levy interest, the interest could not have been levied prior to May 11, 2001 when Finance Bill 2001 was brought into force and therefore, the detention of stock on the basis that the petitioners are liable to pay interest even before May 11, 2001 should be set aside without admitting the liability to pay the interest, in the alternative, it is mentioned that at the best the amount of less than Rs. 2 lakhs becomes due and payable by the petitioners towards the interest and therefore, the goods could not have been detained on the basis that the liability of the petitioners is to pay interest to the tune of Rs. 7,25,806/-. Under the circumstances, the petitioners have filed the instant petition and claimed reliefs to which

reference is made earlier.

5. On service of notice, Mr. Promad Chintaman Phadke, Assistant Commissioner, Central Excise has filed reply affidavit controverting the averments made in the petition. What is highlighted in the reply is that the petitioners had not adopted the correct method of assessing value for payment of central excise duty on captively consumed P.P. multi filament yarn and as the value adopted by the petitioners was less than 115% of the actual cost of production or manufacture of such goods, the petitioners are liable to pay the interest. It is mentioned in the reply that though the petitioners were requested to pay the interest by the Jurisdictional Range Superintendent, Central Excise vide his letters dated April 19, 2005 and November 9, 2005 etc., the petitioners did not pay the interest on their own and therefore, the detention of stocks of the yarn is justified. It is stated in the reply that as the interest was

not paid voluntarily by the petitioners, the stock detained is liable to be auctioned. After placing reliance on the decision in the ***Commissioner of Trade Tax (U.P.) v/s. Kanhai Ram Thekedar (2005 TIO- 76- SC – CE)***, it is pleaded that there is no requirement of notice to be given to the assessee for recovery of interest, since the accrual of interest is automatic and no separate notice demanding the interest is required to be served in that respect. By filing the reply the deponent has demanded dismissal of the petition.

6. This Court has heard Mr. Devang Parikh, learned Counsel for the petitioners and Mr. Purvesh J. Malkan, learned Counsel for the respondents.

7. The contention raised by Mr. Purvesh Malkan, learned Counsel for the respondents that accrual of interest is automatic as a result of which no separate notice of demand was required

to be served upon the petitioners and therefore, the action of detaining the stocks of the petitioners should be upheld is devoid of merits. In ***Commissioner of Trade Tax, Lucknow*** (*supra*), the Supreme Court had an occasion to consider the provisions of U.P. Sales Tax Act, 1948 which are not *pari materia* with the provisions of Central Excise Act, 1944 and therefore, the ratio laid down in the said decision would not be applicable to the facts of the case. Further Section 11AB of the Act deals with payment of interest by the assessee on delayed payment of duty but sub-section (2) thereof which is brought into force with effect from May 11, 2001 reads as under :

> *"(2) The provisions of sub-section (1) shall not apply to cases where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President."*

It is not in dispute that the Finance Bill, 2001 received assent of the President on

May 11, 2001. This fact is admitted even by the respondents in Paragraph 4(e) of the affidavit-in-reply. Therefore, the petitioners are justified in claiming that they are not liable to pay interest prior to the date on which Finance Bill, 2001 was assented by the President.

8. In ***Commissioner of Central Excise, Delhi – III, Gurgaon v/. Machino Montell (I) Ltd., [2004 (168) E.L.T. 466 (Tri.- LB)]***, the Full Bench of the Tribunal after reviewing the law on the point, has held that where the duty amount is paid by the assessee before the issuance of show – cause notice, no penalty can be imposed under Section 11AC nor any interest can be demanded under Section 11AB of the Central Excise Act, 1944. Therefore, this Court is of the opinion that the petitioners are entitled to point out to the competent authority that they are not liable to pay interest on excise duty, voluntarily paid prior to the issuance of show cause notice in view of the fact that Finance Bill 2001, was

assented on May 11, 2001 and the Larger Bench of the Tribunal has held that such interest is not payable.

9. It is an admitted position that the amount of interest mentioned in the detention memo i.e. Rs. 7,25,806/- includes the amount payable for the period, prior to the assent which was given to the Finance Bil 2001, on May 11, 2001 and therefore, it was incumbent upon the competent authority to determine the liability of the petitioners to pay interest with reference to provisions of Section 11AB(2) of the Act. This is not a case wherein the liability to pay the interest is admitted by the assessee. Therefore, before determining the amount of the interest payable by the petitioners, the petitioners should have been afforded an opportunity of being heard. It is admitted by the respondents that before holding that the petitioners were liable to pay interest of Rs. 7,25,806/- no opportunity of hearing was given to the petitioners.

Therefore, the impugned orders are liable to be set aside as being violative of principles of natural justice and the petition deserves to be accepted.

10. For the foregoing reasons, the petition succeeds. The notice dated April 19, 2005 calling upon the petitioners to calculate the interest on duty amounting to Rs. 12,16,646/- and pay interest within five days from the date of receipt of notice produced at Annxure – D to the petition is set aside. The order dated February 14, 2006 passed by the Superintendent, Central Excise, AR- IV, Division – IV, Ahmedabad – II detaining 7250 kgs of P.P. narrow woven fabrics for non – payment of interest of Rs. 7,25,806/- (Rupees Seven Lakhs Twenty Five Thousand Eight Hundred and Six only) which is produced at Annexure – H to the petition is hereby quashed. It is clarified that it would be open to the competent authority to pass an appropriate order after giving opportunity of being heard to the

petitioners. Rule is made absolute accordingly. There shall be no order as to costs.

***[J.M.PANCHAL, J.]***

***[SMT. ABHILASHA KUMARI, J.]***

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